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THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT.

I. GREEK JURISTIC THOUGHT.[1]

THE preceding paper attempted only to mark the course which the development of law has actually taken in different periods of legal history with respect to the end for which law exists. We turn now to the course which juristic thinking has taken during these same periods upon the question what the course of legal development should be and what should be regarded as the end of law. In other words, from legal history, the end of law as developed in legal rules and doctrines, we turn to the philosophy of law, the end of law as developed in juristic thinking. And here we may begin with the Greeks. For if law, in a modern sense, begins with the Romans, philosophy of law begins with the Greeks. What went before them is too remote for the present purpose, what went after them was largely shaped by them. Since the Romans took their philosophical ideas from the Greeks, the Greek idea of the end of law not only governed the Roman world but in consequence in large measure governed the medieval world.

It has been seen that the primitive answer to the question as to

NOTE.—The substance of this paper will appear in a book to be entitled "Sociological Jurisprudence."

[1] Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 13–16; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 1–121.

the end of law was simply that law is a device to keep the peace.[2] Using the term in the sense of the end of the legal system, justice was a device to keep the peace. Whatever served to avert private vengeance and prevent private war was an instrument of justice. Greek philosophy soon got beyond this conception and put in its place an idea of the legal order as a device to preserve the social *status quo*, to keep each man in his appointed groove and thus prevent friction with his fellows. Justice, accordingly, was regarded as maintenance of the social *status quo*, and philosophers were busied in planning an ideal society in which everyone was put in the right place, to be kept there thenceforth by the law. The Pythagoreans spoke of anarchy as the greatest evil, since it left the social order without security, and compared justice to medicine, holding that the legislative and judicial functions, whereby the life of the state is kept in its normal course, were the analogues of hygiene and medicine, whereby the normal course of bodily life is secured or restored.[3] Plato brings out this idea fully. Speaking of the ideal state, he says:

"Shall we not find that in such a city . . . a shoemaker is only a shoemaker, and not a pilot along with shoemaking; and that the husbandman is only a husbandman, and not a judge along with husbandry; and that the soldier is a soldier, and not a moneymaker besides; and all others in the same way? He admitted it. And it would appear that if a man who through wisdom were able to become everything and to imitate everything should come into our city and should wish to show us his poems, we should honor him, . . . but we should tell him that there is no such person with us in our city, nor is there any such allowed to be, and we should send him to some other city." [4]

In Plato's ideal state the individual is not to find his own level for himself by free competition with his fellows, but "every member of the community must be assigned to the class for which he

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[2] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195, 198.

[3] Erdmann, History of Philosophy (Hough's transl.), I, 37. Compare also the ethical theory of Heraclitus. We are told that he held self-will was to be suppressed, and said that the citizen should fight more strenuously for the laws which achieve this than for the walls of his city. Id. 52. Likewise Plato considered lawlessness the greatest of evils, Gorgias, 470, 477, 504.

[4] Republic, III, 424.

proves himself best fitted. Thus a perfect harmony and unity will characterize both the state and every person in it." [5] Hence a universal genius who could not be kept to his assigned place was not to be tolerated. The Stoic doctrine of conformity to nature or conformity to universal reason came to much the same practical result.[6] Aristotle believed that the individual man, apart from the state, became the "most malignant and dangerous of beasts," so that he could "realize his moral destiny but in the state." [7] Accordingly rights, that is, interests to be protected, could exist only between those who were free and equal before the state; [8] justice demanded a unanimity in which there would be no violation of mutual rights, *i. e.*, in which each would keep within his appointed sphere; [9] and right and law took "account in the first instance of relations of inequality, in which individuals are treated in proportion to their worth, and only secondarily of relations of equality." [10] The well-known exhortations of St. Paul in which he calls upon every one to exert himself to do his duty in the class in which he finds himself placed, bring out this same idea.[11]

2. Roman Juristic Thought.[12]

Roman legal genius gave practical effect to the ideal of the legal order as a preservation of the social *status quo* by conceiving it to

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[5] Dunning, Political Theories, Ancient and Medieval, 28. This is but a phase of a metaphysical theory of justice. In the Republic we are told that justice consists in every part of the soul fulfilling its own proper function and not taking up the function of another. Republic, 433 a, 443 c, d, e.

[6] Dunning, Political Theories, Ancient and Medieval, 105. The Stoic *καθῆκον*, which might well be rendered duty, consists in denying the individual natural impulse. In ethical theory, this might lead to the view of Epictetus that one should not be a citizen. In political and juristic theory it led to repression of individual self-assertion. See Erdmann, History of Philosophy (Hough's transl.), I, 190–191.

[7] Politics, I, 1, 9. See Erdmann, History of Philosophy (Hough's transl.), I, 105.

[8] Politics, I, 13; I, 3–7; III, 1; III, 4–5; IV, 11. See Zeller, Aristotle and the Earlier Peripatetics (transl. by Costelloe and Muirhead), II, 175.

[9] Nicomachean Ethics, VIII, 7, 2–4. See especially § 3: "For equality in proportion to merit holds the first place in justice."

[10] Zeller, Op. cit., II, 197.

[11] Eph. 5: 22 ff. and 6: 1–5.

[12] Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 17–20; Hildenbrand, Geschichte und System der Rechts- und Staatsphilosophie, §§ 131–135, 143–147; Voigt, Das Jus naturale æquum et bonum und jus gentium der Römer, I, §§ 16, 35–41, 44–64, 89–96; Willoughby, Political Theories of the Ancient World, chaps. 14–19; Gumplowicz, Geschichte der Staatstheorien, §§ 40–43.

be the province of the state to delimit and secure the interests and powers of action which in their aggregate make up the legal personality of the individual. The Roman ideal, says Courcelle-Seneuil, was a stationary society, corrected from time to time by a reversion to the ancient type.[13]

Cicero finds the basis of law and government, not in enactment but in the moral spirit that is intrinsic in nature.[14] But we must not confound this *lex naturæ* or *lex naturalis* with what we now think of as natural law. Its basis is the conception that everything has a natural principle to be deduced from its characteristics and ends. From this *naturalis ratio*, a natural law may be reached.[15] Thus natural law involves an appeal to substance from form; an appeal to rational principles against traditional forms and arbitrary rules. The natural law of the seventeenth century, appeal to the reason of the individual against authority, and the natural law of the eighteenth century, appeal to the reason of the individual against society and the state, are very different things. A cardinal principle of Cicero's theory of justice is respect for rights acquired under the social order.[16] This idea appears also in the classical formula handed down in the Institutes of Justinian:

"Justice is the set and constant purpose which gives to every one his own." [17]

In other words, the social system has defined certain things as belonging to each individual. Justice consists in rendering him these things and in not interfering with his having and using them within the defined limits.

Another well-known formula of the Institutes expresses the same idea:

"The precepts of right and law are three; to live honorably, not to injure another, to give to every one his own." [18]

[13] Courcelle-Seneuil's parallel between the Roman and the modern ideal, from which the statement in the text is taken, may be found in English in Guyot, Principles of Social Economy (Leppington's transl.), 2 ed., 299. See also Courcelle-Seneuil, Préparation à l'étude du droit, 99, 396.

[14] De Republica, II, 1; De Legibus, II, 4.

[15] Voigt, Das Jus naturale æquum et bonum und jus gentium der Römer, I, 273–274.

[16] "All justice (*æquitas*) is destroyed if one is not permitted to hold his own." De Officiis, II, 22, § 78.

[17] Inst. I, 1, pr.

[18] Inst. I, 1, § 3.

This formula attempts to reduce the whole end of law to three functions: (1) maintenance of decency and decorum in men's outward acts, (2) securing of the interest of personality, (3) securing of the interest of substance. Savigny's much criticized interpretation seems entirely sound. The first precept, to live honorably, that is, to preserve moral worth in one's own person, so far as external acts go, is represented in the legal system by the doctrines as to good faith in transactions, the rules as to illegality of corrupt bargains, the various doctrines which recognize *boni mores* and attach consequences to violations thereof. The second precept, not to injure another, the respecting of another's personality as such, is represented by those rules and doctrines that give practical effect to the interest of personality. The third precept, to render to every one his own, that is, to respect the acquired rights of other men, is represented in the rules and doctrines which secure the interest of substance.[19] And this is simply a juristic development of the Greek idea of the end of the legal order, namely, the idea that its end is to maintain harmoniously the social *status quo*. It is a further development of the primitive idea of a device to keep the peace, and contains a good part of the truth. It is significant that recent German formulas defining the *Friedensordnung*, which is brought about by law, are coming back in some measure to this idea.[20]

3. Medieval Juristic Thought.[21]

Germanic law brought back for a time the primitive conception of merely keeping the peace with its concomitant ideas of buying off vengeance, of a tariff of compositions, and of regulating private war. There is nothing of consequence for the present purpose, therefore, until after the revival of the study of Roman law in Italy in the twelfth century. Moreover, when legal development begins the ruling idea is authority. Not only was Roman law taken to be authoritatively binding, so that it could only be interpreted, but in philosophy authority was held a ground of reason

[19] Savigny, System des heutigen römischen Rechts, I, 407–410.

[20] See my paper, Theories of Law, 22 Yale L. J., 114, 144–146.

[21] Thomas Aquinas, Summa Theologiæ, II, 2, qu. 57–80; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 21–23; Ahrens, Naturrecht, I, § 12; Stahl, Philosophie des Rechts (5 ed.), I, 50–73; Gumplowicz, Geschichte der Staatstheorien, §§ 51–52.

and church doctrine and reason were held to be one.[22] Later the authority of Aristotle was accepted. Hence the conception of justice developed in Greek philosophy and Roman law was received as a matter of course. In the middle ages, as in antiquity, we see the idea of a device to keep the peace succeeded by the idea of a device to maintain the social *status quo*. To Thomas Aquinas, as to Cicero, to the classical Roman jurists and to Justinian, the principle of justice is to give every one his due.[23]

Appeal to reason in support of authority gradually led to an appeal to reason against authority, and that led to a new conception in philosophy, in theology, in politics, and ultimately in juristic theory, as a result of which the legal order came to be regarded as something devised to secure a maximum of individual self-assertion. The beginnings of the change are in philosophy, in the attempt to sustain authority by reason, in the proposition of Erigena that the teachings of the fathers of the church, which rest on their authority, were discovered by them with the aid of reason[24] and in the desire of Anselm to prove the doctrines of Scripture and of the fathers through reason, as if there were no revelation, so as to convince even the unbeliever.[25]

But another factor was introduced by the revival of the idea of natural law and the consequent appeal to conscience against the positive law. This revival, induced by the study of the Roman law, was no doubt furthered by the acceptance of Aristotle as an authority in philosophy. And though in Alexander of Hales, in whose Summa it is first noticeable,[26] and in Thomas Aquinas, who developed it into a detailed theory,[27] natural law has a purely theological basis, the idea was readily turned to new uses presently by a science of law which had cast loose from theology. With this to justify him Lord Acton amended Doctor Johnson's well-known saying so as to read that not the devil but St. Thomas Aquinas was the first Whig.

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[22] Erdmann, History of Philosophy (Hough's transl.) II, 299. "No feature of the Greek theory was more elaborately developed by the scholastics than that which set up unity and permanence as the prime criteria of excellence in political organization," Dunning, Political Theories, Ancient and Medieval, 202.

[23] Summa Theologiæ, II, 2, qu. 58, art. 1.

[24] De Divisione Naturæ, I, 69.

[25] Cur Deus Homo, preface.

[26] II, 2, qu. 40–53.

[27] Summa Theologiæ, I, 2, qu. 91, 93; II, 2, qu. 57–58, 60, art. 5.

Except for the theological version of natural law, the middle ages added nothing to juristic theory. The view of antiquity as to the end of the legal order was accepted. But the way was preparing through philosophy for a new conception of justice which developed in the sixteenth and seventeenth centuries.

4. The Reformation.[28]

For the jurist the significance of the Reformation is to be found in the change from the Roman idea of universal empire and hence universal law to the Germanic or, if one will, feudal idea of a territorial state with a national law. In the law, the Reformation marks a breaking over of Germanic individualism, long kept back by Roman authority. Hence, so far as jurisprudence is concerned, it is a period of clearing away in which the ground is prepared for the constructive period of the seventeenth and eighteenth centuries through the separation of philosophy, politics and jurisprudence from theology and the establishment of a science of politics. The main purpose of the Protestant jurist-theologians was to throw over the authority of the church and to set up the authority of the state. Accordingly the most significant feature of their work, for the jurist, is their insistence on a national rather than a universal law, their insistence on replacing the universal empire of Roman law and canon law by the civil law of each state. The legal system was to rest on the authority of the divinely ordained state, not on an authoritative universal law.[29] All this flowed naturally from the break with authority which substituted private interpretation by the individual, each for himself, for authoritative universal interpretation by the church. The exigencies of this demand for private interpretation led to a claim of independence for the state, for the family and for the natural man. The logical result in jurisprudence

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[28] Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 24; Hinrichs, Geschichte der Rechts- und Staatsprincipien seit der Reformation, I, 1–60; Bluntschli, Geschichte der neueren Staatswissenschaft, chap. 3; Gierke, Johannes Althusius und die Entwickelung der naturrechtlichen Staatstheorien (2 ed.) 18–49, 142–162, 321; Gumplowicz, Geschichte der Staatstheorien, §§ 60–61, 64–65, 68, 75; Dunning, Political Theories from Luther to Montesquieu, chaps. 1–3.

[29] Thus Winckler tells us that *lex* and *ius* are cause and effect, *constituens* and *constitutum*. Principiorum iuris libri quinque, lib. II, cap. 1.

was the opposition of the abstract man to society which developed in the juristic thinking of the eighteenth century.

But the reformers themselves did not perceive the atomistic implications of their position with respect to politics and jurisprudence. Indeed the need of opposing the state to the church led them to a political doctrine of passive obedience.[30] Moreover the period was one of transition from the strict law, which ignored the moral aspects of conduct, to the stage of equity or natural law, which identified law and morals. The strong ethical element in the philosophy of the jurists of the Reformation and the emphasis which the reformers put on abstaining from sinful conduct rather than on repentance therefor, coöperated with this identification of law and morals to postpone the conclusion that the individual conscience was the sole measure of obligation to obey the law. Even if the Christian needed only the spirit for a guide, the rest of the world needed the secular sword of justice, and obedience to Cæsar was expressly enjoined in Scripture.[31]

In its implications the doctrine of the reformers led to the juristic theory of the eighteenth century. But there was much that must first be cleared away. This clearing process begins with Melanchthon, who argues that the whole of natural law may be deduced from the Ten Commandments and from right reasoning as to the nature of man.[32] It goes forward with Oldendorp in whom we find the beginning of the attempts at systematic philosophical statement of the bases of law which we call systems of natural law.[33] It makes a significant stride when Hemmingsen attempts emancipation of jurisprudence from theology, telling us that divine revelation is not necessary to a knowledge of natural law,[34] asserting that

[30] "Melanchthon was no less severe than Luther toward the rebellious peasants who sought by force to escape from the condition of serfage in which they were placed by existing laws." Dunning, Political Theories from Luther to Montesquieu, 15. See the quotations from Luther in Figgis, Studies of Political Thought from Gerson to Grotius, 241.

[31] This is the argument in Luther's tract on secular authority, Werke (hrsg. v. Böhlaus, Weimar), XI, 245, 252. Cf. Melanchthon, Opera (ed. Bretschneider and Bindseil), XI, 451.

[32] Opera (ed. Bretschneider and Bindseil), XVI, 424 ff. See Hinrichs, Geschichte der Rechts- und Staatsprincipien seit der Reformation, I, 18–19.

[33] Iuris naturalis gentium et ciuilis εἰσαγωγή (1539).

[34] De lege naturæ apodictica methodus (1562). The passage referred to is in the preface. Kaltenborn, Die Vorläufer des Hugo Grotius, II, 31.

the firm and necessary ground of a legal system is to be found in the nature and end of the law,[35] and asserting that the ideas of right and wrong may be worked out by reason from the nature of man "without the prophetic and apostolic writings." [36] It gains ground when Winckler seeks to carry out the juristic program outlined by Hemmingsen.[37] On another side it is definitely achieved when Althusius, taking up the idea of a contract between ruler and ruled, which had been a controversial weapon in the conflicts of temporal sovereigns with the church during the middle ages, uses it as the basis of political theory and founds the natural law which is to govern juristic thought for the next two centuries.[38]

No direct change in the idea of the end of the legal order took place in this period. Luther thought of external peace and order as the purpose for which law exists.[39] Melanchthon found the basis of acquired rights in the command "Thou shalt not steal," and defined liberty as the condition "in which each is permitted to keep his own and citizens are not compelled to do anything contrary to principles of right and to what is honorable." [40] In other words, it requires respect for acquisitions and respect for personality.

5. The Spanish Jurist-Theologians.[41]

Just as Comte, in a period of development of the physical sciences, thought of the universe as governed by the principles of mathematics and of physics, and the nineteenth-century sociologists, in the period of Darwin's influence, thought of it as governed by the principles of biology, the Catholic writers of the counter-reformation thought of it as governed by the principles of the then rising science of jurisprudence. Accordingly, in insisting upon the Roman idea of universality they did so in a new way and upon a new basis.

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[35] De lege naturæ apodictica methodus (ed. 1677) C. p. 2; Kaltenborn, II, 32–33.

[36] De lege naturæ, etc., Q. p. 7; Kaltenborn, II, 43–44.

[37] Principiorum juris libri quinque (1615).

[38] Politica methodice digesta atque exemplis sacris et profanis illustrata (1603).

[39] Tract von weltlicher Oberkeit, Werke (Weimar ed.), XI, 245, 253. Cf. Melanchthon, Opera, XI, 435.

[40] See note 32, *supra*.

[41] Soto, De justitia et jure (1589); Suarez, De legibus ac deo legislatore (1619); Figgis, Studies of Political Thought from Gerson to Grotius, Lect., VI; Dunning, Political Theories from Luther to Montesquieu, 132–149.

The organization of the church, its system of church law and its penitential system had tended to give a legal color to both ethics and politics in the hands of clerical writers. The spread of Roman law over Europe had in fact made law universal. A Catholic jurist, therefore, was predisposed to a legal view of the world and a Romanist could vouch everyday fact for a universal view of law. But neither of these views could be maintained longer upon mere authority. Moreover the separateness of states was no less a fact than the universality of Roman law. It was necessary, therefore, to reconcile the general authority of Roman and canon law as the common law of Christendom with the independence and equality of separate states. To effect this reconciliation, the Spanish writers turned to the idea of natural law and sought to join to a theory of independent, equal states a theory of natural law from which all rules of justice of every description derive their authority and of which Roman law and canon law are but expressions within their respective fields.

To the Spanish jurist-theologians the law of each state was not an isolated phenomenon, it was a phase of a universal principle by which all things were governed. This appears particularly in the treatise of Suarez.[42] In this treatise on laws and on God as a legislator there is at first sight no practical distinction between natural law and positive law. Legalist ethics and ethical law go hand in hand. The actual Spanish law, doctrines of the Roman law which he thinks should be although they are not in force in Spain, practical morality and the dictates of reason and conscience combine in a universal system.[43] The identification of law and morals is obviously an incident of the period of infusion of morals into law which was in full vigor at the time. But the new version of universality was an original contribution of the first moment.

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[42] "For it appears that the reason of every one has the force of law at least to the extent of the dictates of natural law. Therefore, at least in natural law it is not a necessary condition that it be enacted by public authority." I, 8, § 1. "It is of the reason and essence of law that it prescribe what is just. The assertion is not only certain in religion but clear in natural reason." I, 9, § 2.

[43] Yet Suarez saw the insufficiency of reason to demonstrate to each man all the rules required for organized society and hence laid down that society might supply the deficiency by declaratory legislation and by customs not in contravention of nature. II, 19, § 9; I, 8, § 2; XII, 13. See Westlake, Chapters on the Principles of International Law, 25–28.

For one thing it made international law possible. If international law was the work of the law-of-nature school after Grotius, it had its roots in this period and the Catholic jurists of the Counter-reformation were first among its forerunners. Our chief concern, however, is with their relation to the individualist idea of legal justice which began to develop in the seventeenth century and culminated in the nineteenth century.

The foundations of a new science of law were laid by reconciling the modern and the medieval, by recognizing the political fact of national law and adjusting it to the medieval ideals of unity and the Germanic conception of law as an eternal verity. The skilful combination of modern ideas with conservatism which characterizes the work of the Jesuit jurists enabled them to effect this reconciliation. Law was eternal. Only it was not eternal because of the authority which imposed it or by which it imposed itself, but because it expressed eternal principles of justice.[44] The old and the new were fitted to this conception. Recognizing the facts of the political world of their time, they conceived of individual states, and thence ultimately of individual men, as equal, since states and men were able to direct themselves to conscious ends and thus their equality was a principle of justice. Holding to the idea of the unity and universality of law as a body of eternal principles, they were led to the conception of restraints by which this equality was maintained and in which it might be expressed. Two types of such restraints suggested themselves, restraints upon states and restraints upon individuals, and these types were taken to be generically one. The restraints upon states, limitations upon their activities which they might not overpass, since they were imposed by eternal principles, might fix the limits of the activities of sovereigns in their relations with each other,[45] giving us international law, or the limits of the activities of sovereigns in their relations with their subjects, giving us political theory.[46] The restraints upon individuals had the same basis in eternal principles of universal law and were of the same nature. They fixed the

[44] Soto, De justitia et jure, I, q. 5, a. 2.

[45] Franciscus de Victoria, Relectiones theologicæ (1557), I, 375 ff. Compare I, 359 ff.

[46] Soto, De justitia et jure, III, q. 3, a. 2; Suarez, III, 35, § 8; III, 9, § 4; III, 11. The argument for separation of powers in the passage last cited is noteworthy.

limits of individual activity in the relations of individuals with each other, giving us juristic theory.[47] Accordingly in the next two centuries these three subjects are always taken up together. The treatises on the law of nature and nations characteristic of the seventeenth and eighteenth centuries, are treatises on international law, on politics and on philosophical jurisprudence. The three were not separated until the nineteenth century.

Comparing the juristic theory so developed with the juristic theory of antiquity, it will be perceived that the conception of the end of law has undergone a fundamental change. The theory of antiquity thought of the legal order as a limiting of the activities of men in order to keep each in his appointed place and to preserve the social order as it stands. The theory which begins with the Spanish jurist-theologians thinks, instead, of a limiting of men's activities in the interest of other men's activities because all men have freedom of will and ability to direct themselves to conscious ends and so are equal. Thus, instead of a device to maintain a social *status quo*, the legal order begins to be thought of as a device to maintain a natural equality.

6. The Seventeenth Century.[48]

It is usual to fix the date of the new era in jurisprudence by the appearance of the great work of Grotius in 1625. As he expounded the new doctrine, it had two sides. On the one hand there was a theory of limitations upon human activities imposed by reason in view of human nature, on the other hand there was a theory of moral qualities inherent in human beings, or natural rights, demonstrated by reason as deductions from human nature. The first had been propounded already by his forerunners. But whereas in Suarez the divine law-maker has established the eternal and universal principles, Grotius makes reason the measure of all obliga-

[47] Suarez, II, 12.

[48] Grotius, De jure belli et pacis (1625), I, 1, 3–6, 8–11; Pufendorf, De jure naturæ et gentium (1672), I, 7, §§ 6–17; Hobbes, Leviathan, chap. 15; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 25–27; Stintzing, Geschichte der deutschen Rechtswissenschaft, II, 1–111; Hinrichs, Geschichte der Rechts und Staatsprincipien seit der Reformation, I, 60–274; II, III, 1–318; Dunning, Political Theories from Luther to Montesquieu, 164–171, 318–325; Duff, Spinoza's Political and Ethical Philosophy, chap. 22.

tion and the basis of all limitations. In part this follows from the definite breaking with theology in which he carried out the ideas of the Protestant jurists of the Reformation. In part it is an echo of the Renaissance.[49] In part also it is a phase of the infusion of morals into law in the stage of equity and natural law. Seventeenth-century jurisprudence followed him and in the eighteenth century Blackstone made these ideas familiar in England and America, with important consequences for our juristic and political thinking. For at the very time that the common law, under the leadership of Coke, had established its doctrine of the supremacy of law and had turned the feudal duties of the paramount lord toward his tenants into the legal duties of the king toward his subjects, a juristic theory of fundamental limitations upon the activities of states, of rulers and of individuals, dictated by external reason, had sprung up independently to furnish the scientific explanation.

As has been said, Grotius and his followers made reason the basis of all obligation. They laid it down that the end for which law exists is to produce conformity to the nature of rational creatures.[50] But Grotius did not think this out with much precision. He had broken with authority as authority, but he accepted the Roman law as embodied reason, and beyond a few bold assertions, such as his famous one that he could conceive of natural law even if there were no God, he ventured little that did not have authority behind it. Hence he and his followers accepted the Roman maxim — not to injure another and to give to every one his due, that is, respect for personality and respect for acquired rights — as a formula of conformity to the nature of rational creatures. This raised certain obvious problems: What is injury to another? What is there in personality that makes aggression an injury? What is it that constitutes anything one's own? Grotius and his successors tried to answer these questions by a theory of natural rights, not merely natural law, as theretofore; not merely principles of eternal validity, but certain qualities inherent in persons and dem-

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[49] "The boundless intellectual confidence of that springtime led them ["the men of the Renaissance"] to regard the dictates of natural law as capable of clear and exhaustive enumeration." Westlake, Chapters on the Principles of International Law, 28.

[50] "That is unjust which is contrary to the nature of rational creatures." I, 1, 3, § 1.

onstrated by reason, recognized by natural law, to which, therefore, the national law ought to give effect. Thus, again, at the very time that the victory of the courts in the contest between the common-law courts and the Stuart kings had established that there were fundamental common-law rights of Englishmen which Englishmen might maintain in court and in which courts would secure them even against the king, a juristic theory of fundamental natural rights, independent of and running back of all states, which states might secure and ought to secure but could not alter or abridge, had sprung up independently and was at hand to furnish a scientific explanation when the next century called for one. By a natural transition, the common-law limitations upon royal authority became natural limitations upon all authority and the common-law rights of Englishmen became the natural rights of man.

According to the Grotian definition, a right is "that quality in a person which makes it just or right for him either to possess certain things or to do certain actions." [51] In other words, the medieval idea was that law exists to maintain those powers of control over things and those powers of action which the social system has awarded or attributed to each man. The Grotian idea was that law exists to maintain and give effect to certain inherent moral qualities in every man, discovered for us by reason, by virtue of which he ought to have certain powers of control over things or certain powers of action. Thus, under the influence of the theory of natural law, we get the theory of natural rights. A right is an institution of law. But according to the theory of natural law, what ought to be law is regarded as law for that self-sufficient reason. No rule can stand as law except as it ought to be, and conversely to show that it ought to be law is to show that it is law. Hence what ought to be a right becomes identical with what is a right.

There was a good side to all this. The insistence on what ought to be as the measure of what is, liberalized and modernized the actual law of the European states through the juristic testing of every doctrine and every category with reference to its basis in reason. But it had a bad side. It led to a confusion between the interests which it is conceived the law ought to recognize and the

[51] Rutherforth, Institutes of Natural Law, I, 2, § 3.

rights by which the law secures interests when recognized, which has been the bane of jurisprudence ever since, and it led to absolute notions of an ideal development of received legal ideas as the jural order of nature which have brought legal thought and popular political thought into an obstinate conflict.

Since Jhering's treatment of the subject we have perceived that "natural rights" means only interests which we hold ought to be secured. It is perfectly true that neither the law nor the state creates these interests. But it is destructive of sound thinking to treat them as legal conceptions. Rights in the legal sense are among the devices of the law to secure these interests. Legal rights are the creatures of law, although the interests secured or which ought to be secured by legal rights are independent of law and of state. Hence we did not get much further, immediately, when in the seventeenth century justice came to be regarded as a securing of natural rights. What were natural rights was determined chiefly by ideas drawn from the existing social order and presently the natural rights of men became as tyrannous as the divine rights of states and rulers.[52]

Although the theory of natural rights led ultimately to a hard and fast scheme of individual interests, beyond the reach of the state, which the state was bound to secure by law, it had important consequences in broadening the conception of justice and inducing more liberal views as to the end of the law. It soon became apparent that the theory of inherent moral qualities, while it would serve for interests of personality — for claims to be secured in one's body and life and the interests immediately related thereto — would not serve for the *suum cuique* element of justice, or, as we put it to-day, for interests of substance. None of the jurists of that time questioned the existing social order. On the contrary they assumed a right of property as beyond question.[53] They conceived that security of acquisitions, including what one had acquired through the existing social order, was a chief end.[54] At the same time they could not but see a difference between this natural right and such natural rights as those to the integrity of one's body, to free motion and locomotion and to free speech.

[52] Moore, Pragmatism and Its Critics, 71.

[53] Pufendorf, De jure naturæ et gentium, IV, 4.

[54] Grotius, II, 1, 1; II, 1, 11; II, 10, 1; II, 17, 2, § 1.

Accordingly jurists turned for an explanation to the idea of contract, already given currency in political thought during the medieval contests between the church and temporal rulers.[55]

It must be remembered that contract in this connection has reference to the civil-law conception of a legal transaction (*negotium, Rechtsgeshäft*), an act intended to have legal consequences to which the law attributes the intended legal result. In the seventeenth and eighteenth centuries this was the staple legal analogy. The idea of the legal transaction was one of the most important of Roman contributions to law, and in an age when trade and commerce were expanding the law of such transactions was becoming the living part of the law. The juristic problem of the time was to reconcile the needs of business and the ethical ideas of good faith which accompanied the infusion of morals into the law with the traditional categories of contract in Roman law. Naturally contract loomed large in juristic thought for two centuries. Moreover the central point in the theory of the legal transaction is will, the will to produce a possible and legally permissible result. But the central idea in the theory of natural law and of natural rights was conformity to the nature of reasoning creatures possessed of wills. So the question, how could such creatures acquire rights against one another, seemed easy to answer. How, indeed, could this be except by contract, through a legal transaction? Thus the foundation of the natural rights of substance which the law existed to maintain was taken to be a legal transaction, a compact of all men with all men, by virtue of which rights and corresponding duties were created. Justice, therefore, consisted in respecting and observing the terms of this compact, and the business of jurist and law-maker was to discover and to interpret its terms.[56] The end of the law was taken to be a giving

[55] See Figgis, Studies of Political Thought from Gerson to Grotius, 148–151.

[56] "It must be observed that the concession of God by which He gives men the use of terrestrial things is not the immediate cause of ownership . . . but it [ownership] presupposes a human act and an agreement, express or implied." Pufendorf, De jure naturæ et gentium, IV, 4, § 4.

"From that law of nature by which we are obliged to transfer to another such rights as being retained hinder the peace of mankind, there followeth a third, which is this, 'that men perform their covenants made'; without which covenants are in vain and but empty words, and the right of all men to all things remaining, we are still in a condition of war. And in this law of nature consisteth the fountain and original of

effect to the inherent moral qualities in individual men, whereby things are theirs, or a securing to individual men of those things to which they are entitled under the terms of the social compact.

While at first theories of natural rights and of a social contract were used to justify and to preserve the social *status quo*, they invited inquiry into the foundations of that social *status quo*. They led men to ask, how far does it express the terms of the social compact? How far does it depart from a true interpretation thereof? It is manifest that such juristic theories might become very important for political thought. But their chief importance for our present purpose is to be found in their relation to the individualism of Anglo-American legal thought. In themselves the theories are thoroughly individualist. The natural rights which are the measure of all law, are the rights of individuals who have entered into a contract. Apart from this contract, and so apart from the individual consent involved therein, there would and could be no law and nothing for the law to secure. Individualism of this sort, beginning with the Reformation and growing with the emancipation of the middle class,[57] obtained throughout Europe from the seventeenth century. Puritanism, with its régime of "consociation but not

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justice. For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything, and consequently no action can be unjust. But when a covenant is made, then to break it is unjust; and the definition of injustice is no other than the not performance of covenant. . . . And therefore where there is no 'own,' that is, no property, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no property, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice consists in the keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that property begins." Hobbes, Leviathan, chap. 15.

"Again, in the state of nature no one is by common consent master of anything, nor is there anything in nature which can be said to belong to one man rather than another. Hence in the state of nature we can conceive no wish to render to every man his own or to deprive a man of that which belongs to him; in other words there is nothing in the state of nature answering to justice and injustice. Such ideas are only possible in a social state, when it is decreed by common consent what belongs to one man and what to another." Spinoza, Ethics, pt. IV, pr. 37, n. § 2 (Elwes' transl.).

[57] "The cultural mission of the Reformation was to give life to individual freedom." Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 137. The relation of the development of individual rights and the emancipation and hegemony of the middle class is considered elaborately by Dr. Berolzheimer in his review of the maturity and downfall of the old natural law. Id. chap. 5.

subordination" [58] and its putting of individual conscience and individual judgment in the first place,[59] the victory of the courts in the contests between courts and crown in seventeenth-century England, which seemed to establish that the law was something that stood between the individual and organized society and secured his natural rights, political theory in the eighteenth century culminating in our bills of rights, and the philosophy of law in the nineteenth century with its different modes of demonstrating Kant's formula of justice successively developed and reënforced this tendency. Thus in England, and even more in America, there came to be an ultra-individualism in legal thought which persisted in the United States to and even beyond the end of the nineteenth century.

Putting the matter in modern phrase, according to the seventeenth century, law exists to maintain and protect individual interests.

7. The Eighteenth Century.[60]

Seventeenth-century theory had taken two directions. On the one hand it conceived of rights as the outgrowth of a social contract. It held that there would be none without the social organization and that there would be no justice or law without the political organization, that is, without the state. From Hobbes and Spinoza this idea passes to Bentham, and thence in the nineteenth century to the English analytical jurists, whose theory of the nature of law is in the right line of descent therefrom. On the other hand there was the Grotian idea of rights as qualities inhering in persons. This theory put rights above the state and justice above the state as permanent, absolute realities which the state was organized to protect. It was not that there were

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[58] See Lord Acton, Lectures on Modern History, 200.

[59] Ibid. 10.

[60] Montesquieu, L'esprit des lois, liv. I; Burlamaqui, Principes du droit de la nature et des gens, I, 1, chap. 5, § 10, and chap. 10, §§ 1–7; Wolff, Institutiones juris naturæ et gentium, §§ 74–102; Vattel, Le droit des gens, liv. I, chap. 2, §§ 15–17; Rousseau, Contrat social, liv. I, chap. 6; Blackstone, Commentaries, I, 38–43; Rutherforth, Institutes of Natural Law, bk. II, chap. 5, §§ 1–3; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 29; Korkunov, General Theory of Law (Hastings' transl.), § 7; Ritchie, Natural Rights, chap. 3; Charmont, La renaissance du droit naturel, 10–43.

justice and rights because there was a state. There was a state because there were rights and justice to protect and to secure. Historically, the latter theory is connected with the Germanic idea that the state is bound to govern by law; the notion of the *Rechtsstaat*, the state subject to legal limitations and legal rules of general validity independent of the state.[61] In the eighteenth century the second idea definitely prevailed. The social contract was not the source of rights. It was made for the better securing of preëxisting natural rights.[62] Both theories are thoroughly individualist.

Eighteenth-century juristic theory, down to Kant, holds to four propositions: (1) There are natural rights demonstrable by reason. These rights are eternal and absolute. They are valid for all men in all times and in all places.[63] (2) Natural law is a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.[64] (3) The state exists only to secure men in these natural rights.[65] (4) Positive law is the means by which the state performs this function, and it is obligatory only so far as it conforms to natural law.[66] The appeal is to individual reason. Hence every individual is the judge of this conformity. Also on this theory natural rights alone are legal rights, for law is only a means of secur-

[61] It is curious that in England, where the Germanic idea became thoroughly established in public law (except as to Parliament after 1688), the idea that all rights and all justice flowed from organized society prevailed in juristic thought, while on the Continent, where the Roman idea prevailed in public law, the Germanic idea got the upper hand in juristic theory. But the latter had apparent warrant in the Roman *ius naturale*.

[62] "But how great soever the change may be which government and sovereignty make in the state of nature, yet we must not imagine that the civil state properly subverts all natural society or that it destroys the essential relations which men have among themselves. . . . This would be neither physically nor morally possible; on the contrary the civil state supposes the nature of man, such as the Creator has formed it; it supposes the primitive state of union and society, with all the relations this state includes; it supposes, in fine, the natural dependence of man with respect to God and His laws. Government is so far from subverting this first order that it has been rather established with a view to give it a new degree of force and consistency. It was intended to enable us the better to discharge the duties prescribed by natural laws. . . ." Burlamaqui, I, 2, chap. 6, § 2. Cf. Vattel, liv. I, chap. 13, § 158.

[63] Burlamaqui, I, 1, chap. 7, § 4; Wolff, §§ 68–69.

[64] Burlamaqui, I, 2, chap. 4.

[65] Id. II, 1, chap. 3; Wolff, § 972.

[66] Burlamaqui, II, 3, chap. 1, § 6; Wolff, § 1069; Vattel, liv. I, chap. 13, § 159; Blackstone, I, 41.

ing them. Pushed to its logical limits, this leads straight to anarchy, and, indeed, the philosophical anarchist still proceeds upon this line.[67] But the eighteenth-century writers who taught that every man's conscience was the measure of the obligatory force of legal rules assumed a sort of standard conscience, a standard man's or conscientious man's conscience analogous to the prudence of the reasonable man in our law of torts. They assumed that if John Doe or Richard Roe asserted *his* conscience did not sustain the rules which the philosophical jurist deduced from the nature of a moral being, he either did not know the dictates of his own conscience or he was misrepresenting them in order to evade the binding force of the rule. It was only in this way that the social interest in general security could be protected effectively under the reign of the individualist natural law. But this meant in practice that the philosophical jurist made his personal ethical views the test of the validity of legal rules and that the lawyer took an ideal form of the settled legal principles in which he had been trained to be fundamental and eternal. The eighteenth-century philosophical method was of service in jurisprudence in that it led each jurist to work out ideal standards which could serve for a critique of the positive law. On the other hand it was a hindrance to jurisprudence in America in that it seemed to afford a scientific basis for the lawyer's faith in the finality of the common law. The common law rested on the idea that reason, not arbitrary will, should be the measure of action and of decision. The eighteenth century, however, was sure that it had the one key to reason, and was fond of laying out philosophical and political and legal charts by which men were to be guided for all time. The lawyer believed that he had this key in the traditional principles of Anglo-American law and drew his charts accordingly.

It has been pointed out in another connection that the juristic theory of natural rights was thoroughly individualist in both its aspects. As a theory of inherent moral qualities of persons it was based on deduction from the nature of the abstract, isolated individual. As a theory of rights based upon a social compact, it thought of natural rights as the rights of the individuals who had

[67] Brown, Underlying Principles of Modern Legislation, 7 ff.; Ritchie, Natural Rights, 65 ff.

made the compact and had thereby set up the social and political order to secure them. In either view, the end of the law is to maintain and protect individual interests. This fitted so perfectly the legal theory of the common-law rights of Englishmen that the founders of our political and legal and judicial systems who were studying Coke and Blackstone on the one hand, and the French and Dutch publicists on the other hand,[68] had no doubt they were reading about the same things. Hence Americans of the end of the eighteenth century argued for either or for both. The declaration of rights of the Continental Congress in 1774 asserted the legal rights of Englishmen. The Declaration of Independence two years later asserted the natural rights of man. Yet each claimed the same things.

From this identifying of common-law rights with natural rights it followed that the common law was taken to be a system of giving effect to individual natural rights. It was taken to exist in order to secure individual interests not merely against aggression by other individuals but even more against arbitrary invasion by state or society.[69] It followed also that the bills of rights were declaratory of natural rights,[70] and were likewise declaratory of the common law.[71] This idea is prominent in judicial decisions in the

[68] *E. g.*, Wilson's Lectures on Law (1804). Chapters 2 and 3 (Of the General Principles of Law and Obligation and Of the Law of Nature) are based on Blackstone, Grotius, Pufendorf, Burlamaqui, Wolff, Vattel and Rutherforth's Institutes of Natural Law (1754–56), an English exposition of Grotius which went through two American editions early in the nineteenth century.

[69] Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 134 (1810); Story on the Constitution, § 1399; Cooley, Constitutional Limitations, 358–383. Cf. Wilson, Works (Andrews' ed.) I, 566.

[70] Story on the Constitution, § 1381; Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798); Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 657 (1829); Terrett *v.* Taylor, 9 Cranch (U. S.) 43 (1815); Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 662 (1874); Benson *v.* Mayor, 10 Barb. (N. Y.) 223, 224 (1850). "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist . . . a case of direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary." Hosmer, C. J., in Goshen *v.* Stonington, 4 Conn. 209, 225 (1822). Cf. Regents *v.* Williams, 9 Gill & Johns. (Md.) 365 (1838).

[71] "The usual Anglo-Saxon bill of rights, as contained in our state constitutions, is in fact nothing more or less than the written expression of a previously existent, but silent limitation upon the power of legislators which is imposed even without the writing." Abbot, Justice and the Modern Law, 47. "The very first and indispensable

nineteenth century, when the ideas of the eighteenth century had become classical. Thus one court, in passing on legislation directed against fines in cotton mills, told us that a statute which violates "fundamental rights [is] unconstitutional and void even though the enactment of it is not expressly forbidden." [72] Another court told us that natural persons did not derive their right to contract from the law; hence whatever the state might do in limiting the power of a corporation to make certain contracts, because the corporation got its power from the state, it might not limit the contractual capacity of natural persons, who got their right to contract from nature, so that nature alone could remove it.[73] Another court, in passing adversely upon labor legislation infringing upon liberty of contract, said that any classification was arbitrary and unconstitutional unless it proceeded on the "natural capacity of persons to contract." [74] Another, in a similar connection, denied that contractual capacity could be restricted except for physical or mental disabilities.[75] All these instances come to the proposition that the common-law categories of disability are final and that legislation cannot add new ones. The bills of rights and the Fourteenth Amendment were treated as but declaring a natural liberty which was also a common-law liberty. Hence an abridgment not known to the common law was thought to go counter to their fair construction, if not to their letter. Perhaps nothing has contributed so much to create and foster hostility to courts and law and constitutions as this conception of the courts as guardians of individual natural rights against the state and against society, of the law as a final and absolute body of doctrine declaring these individual natural rights, and of constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state, having for their purpose to guarantee and maintain the

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requisite in legal education . . . is the acquisition of a clear and accurate perception . . . of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs." Phelps, Methods of Legal Education, 1 Yale L. J. 140. Cf. Sharswood, Legal Ethics (5 ed.), 31–54.

[72] Comm. *v.* Perry, 155 Mass. 117, 28 N. E. 1126 (1891).

[73] Leep *v.* Railway Co., 58 Ark. 407, 25 S. W. 75 (1894).

[74] State *v.* Loomis, 115 Mo. 307, 22 S. W. 350 (1893).

[75] State *v.* Fire Creek Coal & Coke Co., 33 W. Va. 188, 10 S. E. 288 (1889).

natural rights of individuals against the government and all its agencies.

While we were receiving the eighteenth-century theory in America and were making it the foundation of our political and juristic structures, the theory was about to get its death-blow at the hands of Immanuel Kant. If in fact the individual conscience was made the sole test, the theory could be practically tolerable only at a time when absolute theories of morals prevailed. All men, or most men, must agree in their moral standards, or agree in looking to some ultimate authority for decisive pronouncement on the content and application of moral principles, or else legal doctrine would be wholly at large. Hence the actual situation was that the lawyer took the principles of the received legal tradition as an authoritative guide while the jurist and philosopher sought to impose their several personal views as final statements of fundamental principles. Bentham pointed this out in a famous passage. He said the various criteria proposed by jurists and moralists "consist in so many contrivances for avoiding the obligation of appealing to any external standard and of prevailing upon the reader to accept of the author's sentiment or opinion as a reason for itself." [76] When absolute theories began to be discarded and ultimate authorities were no longer recognized; when, moreover, classes with divergent interests came to hold diverse views upon fundamental points, natural law in the eighteenth-century sense became impossible. Accordingly in the nineteenth century the historical jurists threw over ideals entirely and the metaphysical jurists sought to deduce natural law from some fundamental conception of right or justice.

The immediate cause of this change of base is to be found in the philosophy of Kant. At the end of the eighteenth century he struck a decisive blow at the philosophical jurisprudence which had obtained for the past two centuries. If natural rights were inherent moral qualities to be ascertained by reason, granting that reason could deduce infallibly from given premises, how could reason give us the premises? If, on the other hand, natural rights rested on a social contract, how could the details or the implied terms of a contract of a past generation bind the men of to-day? The fiction of representation, the doctrine insisted upon by Blackstone

[76] Principles of Morals and Legislation (new ed., 1823), 17.

that we were represented when our fathers made the contract and so are bound, was obviously founded on British political theory in which all consent to acts of Parliament through the representatives sent to Westminster to act for them. It would not bear examination. Hence Kant sought to find the basis of rights and of justice as a means of securing rights in some ultimate metaphysical principle, some ultimate datum from which rights might be deduced. He found this fundamental idea in freedom of will. He conceived that the problem of law was to reconcile conflicting free wills. He held that the principle by which this reconciliation was to be effected was equality in freedom of will, the application of a universal rule to each action which would enable the free will of the actor to co-exist along with the free will of every one else.[77] The whole course of nineteenth-century juristic theory was determined by this conception. Kant marks an epoch in philosophical jurisprudence no less than Grotius.

Summarily stated, to the eighteenth century, justice, the end of law, meant the securing of absolute, eternal, universal natural rights of individuals, determined with reference to the abstract individual man. Kant, on the other hand, held it to mean the securing of freedom of will to every one so far as consistent with freedom of all other wills. Thus the transition was complete from the idea of justice as a maintaining of the social *status quo* to an idea of justice as the securing of a maximum of individual self-assertion.

Roscoe Pound.

HARVARD LAW SCHOOL.

[*To be continued.*]

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[77] "Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of the will of each and all in action according to a universal law." Metaphysische Anfangsgründe der Rechtslehre (2 ed.), XXV. Cf. "I must in all cases recognize the free being outside of me as such, that is, must limit my liberty by the possibility of his liberty." Fichte, Grundlage des Naturrechts, I, 49.